In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1545

JACK STEVEN KARNES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

In 1945, petitioner was convicted by general court-martial of desertion from the armed forces and was sentenced to ten years' imprisonment and a dishonorable discharge. On June 19, 1968, Congress passed 18 U.S.C. App. (Supp. V) 1202(a), which, *inter alia*, makes it a crime if any person previously convicted of a felony or dishonorably discharged "receives, possesses, or transports in commerce or affecting commerce, * * * any firearm." Thereafter petitioner received firearms shipped in interstate commerce to his

business in California. In the course of his occupation as a machinist, he performed various welding and machining operations on the firearms. In November 1968, he traveled interstate to Phoenix, Arizona, to deliver 50 carbines to a firearms dealer.

Thereafter, petitioner was charged in a criminal indictment with unlawfully receiving and possessing firearms in commerce, in violation of Section 1202(a). After a jury trial in the United States District Court for the Central District of California, he was convicted of that offense and sentenced to five years' probation. The court of appeals affirmed on January 22, 1971 (Pet. App. B; 437 F. 2d 284).[1]

This case does not involve the question relating to Section 1202(a) that is raised in *United States* v. *Bass*, No. 1285 this Term, certiorari granted, March 29, 1971, and there is no relationship between the cases. The question in *Bass* is whether the statute punishes possession of a firearm not specifically proven to be "in commerce or affecting commerce." Here, however, the government in fact alleged and proved actual interstate transportation of the firearms.

In his petition, as in the court below, petitioner makes a variety of constitutional attacks upon the statute. His principal contention is that it is irrational for Congress to prohibit transactions in firearms by persons convicted of non-violent crimes. He also argues that the statute, as applied to persons who

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[1] The petition was filed on April 6, 1971, and is therefore substantially out of time under Rule 22(2) of the Rules of this Court.

have been convicted or dishonorably discharged prior to its effective date, is an *ex post facto* law. These claims are fully answered in the opinion below (Pet. App. A), on which we rely here.

We point out, additionally, that since 1961 related statutes presently codified at 18 U.S.C. (Supp. V) 922(g) and (h)—formerly 15 U.S.C. 902(e) and (f)—have made it a crime for any person convicted of a felony to receive or transport any firearm in interstate commerce. The rationality of such a prohibition, as applied to a person convicted of a non-violent felony, has been considered in cases under these earlier, related statutes and sustained. *Williams* v. *United States*, 426 F. 2d 253 (C.A. 9), certiorari denied, 400 U.S. 881; *United States* v. *Thoreson*, 428 F. 2d 654 (C.A. 9). Moreover, an identical result has been reached by the Eighth Circuit on consideration of the instant statute. *United States* v. *Synnes*, No. 20,438, decided February 1, 1971, slip op. 12-13, pending on a petition for certiorari, No. 6805 this Term. It was reasonable for Congress to conclude, as it did implicitly in its formal findings relating to the instant statute (18 U.S.C. App. (Supp. V) 1201), that persons previously convicted of *any* serious crime would have a greater propensity than others to use firearms for improper purposes.[2]

Petitioner's argument that, as applied to him, Section 1202(a) is an *ex post facto* law is without merit.

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[2] There is no substance to petitioner's subsidiary argument that his court-martial conviction was not the equivalent of a felony. See *United States* v. *Lee*, 428 F. 2d 917, 919-920 (C.A. 6), rejecting the same claim as to former 15 U.S.C. 902(e).

The passage of the statute in June 1968 put petitioner on notice that transportation or receipt by him of a firearm in interstate commerce would violate federal law. He is thus not now being punished for conduct which was not criminally proscribed at the time of commission. See *United States* v. *Wechsler*, 392 F. 2d 344, 346-347 (C.A. 4), certiorari denied, 392 U.S. 932; *United States* v. *Lee*, 227 F. Supp. 450, 451 (D. N.Dak.). The apparent contention that Congress could not, consistent with the *ex post facto* clause of the Constitution, restrict his right to bear arms is also baseless, since the *ex post facto* clause is directed only at criminal penalties. *E.g.*, *Galvan* v. *Press*, 347 U.S. 522, 531-532; *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 593-596; *Lehmann* v. *Carson*, 353 U.S. 685.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

MAY 1971.

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